

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 32**

(Salinas, California)

**EL AGUILA FOOD PRODUCTS, INC.
Employer¹**

and

**LABORERS INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO,
LOCAL UNION 270
Petitioner**

Case 32-RC-4610

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, herein called the Act, a hearing was held before a hearing officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding,² the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer, a California corporation with an office and facility located in Salinas, California, is engaged in the production and sale of tortillas and other food products. During the previous twelve months the Employer sold and shipped goods valued in excess of \$50,000 to customers which in turn meet one of the Board's standards for assertion of jurisdiction on a direct basis. Based on the foregoing, I find that the Employer is engaged in commerce within the meaning of the Act. Accordingly, the assertion of jurisdiction is appropriate herein.

¹ The Employer's name appears as amended at the hearing.

² Briefs filed by the parties have been duly considered.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer, and a question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The Petitioner seeks a unit of drivers/sales representatives. The Employer contends however, that the office clerical employees share a sufficient community of interest with the sales driver classification to warrant their inclusion in the unit. Thus, the sole issue to be determined herein is whether office clerical employees should be included in the sales drivers unit.

The Employer's Salinas facility is composed of a manufacturing building, which employs between 10 and 15 production employees not at issue here, a warehouse, and a deli-market. The warehouse facility is managed by William Chisum, general sales manager. Chisum's brother Russ Chisum, Basilio Ramirez, and Frank Nava are designated as territorial sales managers who supervise the sales drivers assigned to routes in their respective territories. Pam Mills, Chisum's sister, is the general manager for plant operations. All of the office employees, also known as accounting department team associates, report to Mills.

The Employer employs about 16 sales drivers, also known as route managers, who are responsible for delivering product on a daily basis to customers along their respective routes. The sales drivers are also responsible for routine maintenance on their assigned trucks. The sales drivers wear uniform pants and shirts with the company emblem. Their starting times range from 3:30 a.m. to 5:00 a.m. depending on the distance of the driver's assigned route from the facility. When they report to the depot, they punch the time clock and sort their orders according to computer generated load sheets. Certain sales drivers are assigned to get product out of the warehouse and get it on the sidewalk in the loading area. Each sales driver makes sure that the correct products for their customers are available, and load their empty trucks using dollies and carts. They get the information about what cases to load from their individual hand-held computers. Once the trucks are loaded a territorial sales manager takes the sales driver's hand-held computer and checks the load in the truck to verify that it matches the amount of product designated by the hand-held computer. The sales driver prints out a final load sheet and prepares to depart. The record does not indicate how much time the sales drivers spend preparing in the warehouse depot before they depart on their routes. The routes are organized geographically rather than by store or customer. The hand-held computers with all of the necessary customer and product information remain with the sales drivers as they complete their route. Sales drivers are responsible to make sure that product is delivered

and placed in the allocated space designated by the customer, particularly with chain accounts. The sales drivers are also responsible for developing accounts. They accomplish this in the time remaining after their scheduled deliveries by pursuing new customers and developing leads in the vicinity of their assigned route.

Although there is no direct line of communication between the sales drivers and the accounting department office during the day, the sales drivers can be beeped on pagers they carry. If paged, they find a pay phone to call the office. Such contact is usually made with Angel Parks, main receptionist accounting department, or Lynn Vuong, office manager. If vehicles break down, the sales drivers call Parks or Vuong to arrange towing services.

At the end of the day, the sales drivers return to the depot between 1:00 p.m. and 3:00 p.m., depending on the route and traffic conditions. They back their trucks up and use the dollies and carts to unload any empty boxes or containers, product that was over-ordered, or stale product that customers can no longer sell. After refueling, the sales drivers must check in with Parks to settle their routes. Parks goes to the settlement area in the warehouse and verifies the unloaded product on the hand-held computer. The sales drivers also check the drivers' board for messages or notes regarding situations and instructions concerning their customers. The sales drivers are responsible for entering a settlement report on the accounts and invoices for the day and the orders for the next day. Parks and, at times, Vuong participate in preparing the settlement report by including information they have received during the day directly from customers regarding the orders for the following day. On such occasions the sales drivers have access to Park's and Vuong's offices which are about ten feet apart in the front of the warehouse. The sales drivers either submit their invoices and any cash or checks for the day to Parks or place them in a box in her office. Parks processes and files the invoices. She also checks any returned product to determine whether it is unable to be sold. If there is information that she has gathered during the course of the day regarding the customers on the route, she relays that to the sales drivers. For example, if an account has become delinquent, she brings it to the sales drivers' attention so that they can follow up on the matter on their next delivery. Parks spends from 5 to 10 minutes with each driver when they return to the depot. The entire check in time may take between 8 and 15 minutes per sales driver.

During the course of the day, Parks receives orders from stores and handles customer complaints. If she cannot handle the matter, she refers it to Mills, Chisum, or one of the other managers. Parks may also directly contact the sales drivers regarding customer inquiries. In addition to the personal computer which is part of the Employer's network system on which she performs word processing, Parks also utilizes a hand-held computer. It is not clear whether Parks' hand-held computer is part of the same network of information retained in the sales drivers' hand-held computers. About one third of Parks' day is spent on

the phone with the sales drivers resolving customer inquiries and clarifying orders. Most customers contact Park at the office rather than directly contact the drivers who do not carry cell phones. In addition to her duties checking in the drivers, Parks processes the credit applications which are distributed to new customers and approves their credit applications. She then informs the sales drivers as to whether the application has been qualified or denied. She may do so directly, or by leaving written messages on the drivers' board. A written message from Parks may necessitate further contact with her by the sales drivers to follow up on the message. Parks sets the limits for what can be sold on credit to particular customers and relays that information to the sales drivers. Another of Parks' functions is to coordinate special store programs which entail free product being delivered to chain stores as a method to gain entry into the store. Parks also coordinates the Employer's donation program with local charities and food banks.

As stated above, Vuong has the title office manager. She reports to Mills. Vuong is responsible for managing the Employer's budgeting, accounting, and payroll. She also has the responsibility for supervising Parks, and team associates Maria Reyes and Cathy Ruiz.³ In addition to performing word processing on her personal computer, on a weekly basis Vuong is responsible for inputting new products, prices, and promotions into the sales drivers' hand-held computers. She also handles health insurance enrollment, vacation request forms, holiday pay questions and exit interviews. In addition, she processes accident reports filed by the sales drivers and handles communications regarding such accidents with the insurance companies. She also collects receipts from the sales drivers to process reimbursements for the purchase of their uniforms. Vuong also has enough expertise with the hand-held computers to handles sales drivers' operational questions and problems.

Maria Reyes⁴ acts as payroll clerk for the manufacturing and sales operations. She also acts as a back up receptionist to Parks. She has a desk in Vuong's office. She operates a personal computer which is part of the Employer's business network. She takes calls from sales drivers, attempts to route those calls to Parks, but may handle them herself. Her other duties include creating time cards, verifying time card discrepancies with employees, inputting

³ There was neither a contention nor evidence in the record to establish whether Vuong possesses supervisory authority within the meaning of the Act. In view of my finding herein, it is not necessary to reach the issue of Vuong's supervisory status.

⁴ The Employer does not seek to include payroll clerk Maria Reyes in the unit, apparently because at the time of the hearing she had given notice and was expected to leave by May 1, 1999. The Employer has not decided whether to hire a replacement for Reyes, or to eliminate the position of payroll clerk and divide those duties among the remaining office employees. The Union does not seek to include Reyes because she is an office clerical employee and because, like Cathy Ruiz whom the parties stipulated is a confidential employee, it contends that Reyes is a confidential employee who is responsible for a variety of confidential payroll functions. Given my findings below, it is unnecessary to make any determinations regarding Reyes' status.

information from the time cards into the payroll computer, making payroll reports, printing and distributing payroll checks, handling payroll questions, preparing employment verification documents, and assisting Vuong in accounting functions.

When Parks, Vuong, Reyes, and Ruiz take breaks and lunches they do so in the Employer's deli market which is open to the public. Parks, Vuong, Reyes, and Ruiz do not wear uniforms.

The sales drivers are paid on three compensation levels. Level one employees are paid \$7.50 an hour. Level two employees are paid \$8.00 an hour, plus a 3% commission depending on their ability to generate new customers. Level three employees are paid a \$450 per week base salary, plus a 6% commission. All of the office clerical employees are paid salaried rather than hourly. Vuong is paid a salary of \$720.00 per week. The record indicates that Parks is paid a salary of \$480.00 per week, an equivalent to \$12.00 per hour. Reyes is paid \$450.00 per week, an equivalent to \$11.25 per hour.

The sales drivers and the office clerical employees are covered by the same health benefits plan with the same terms of coverage. After an initial qualification period for new employees, they are also all eligible for two weeks vacation. All of the employees are eligible for holiday pay 7 days a year. The office personnel punch the same time clock as the sales drivers and report between 7:00 a. m. and 8:00 a. m. and depart between 4:00 p. m. and 5:00 p. m., Monday through Friday, although Parks and Vuong come in on Saturdays to work for a few hours making computer entries so that the manufacturing part of the operation will know how much product to make for Monday's deliveries.

The Employer maintains written house rules which employees are required to sign and which are applicable to sales drivers as well as office clerical employees.

The sales drivers attend safety meetings conducted by Chisum. They also attend monthly or bimonthly sales meetings to discuss various issues. The office staff attends these sales meetings about 30 to 40% percent of the time.

There is no history of collective bargaining on behalf of the Employer's employees. However, in Case 32-RC-3025, a different union sought to represent a unit of the Employer's employees which included the office clericals and sales drivers. The parties in that case stipulated to an election and also agreed that Vuong was eligible to vote in the election. The employees did not select representation in that election.

It is well settled that the unit sought by a petitioner does not have to be the only appropriate unit. It is sufficient that the unit sought is an appropriate unit. In addition, the Board is reluctant to require a labor organization to represent

employees it does not wish to represent. See Overnite Transportation Co., 322 NLRB 723 (1996); Mc-Mor-Han Trucking Co., 166 NLRB 700 (1967). Here the record establishes that the petitioned for unit of sales drivers excluding office clerical employees is an appropriate unit.

While the Employer's accounting and sales systems are functionally integrated and its clerical employees perform clerical tasks during the work day which facilitate the sale and delivery of product by the sales drivers, the fact remains that the sales drivers spend a minimal amount of time each day at the warehouse and the vast majority of their work day outside the warehouse experiencing different working conditions and demands than the office clericals. Moreover, the sales drivers work under a separate line of supervision from the office clericals. Thus, under the direction of the territorial managers, they load their trucks by themselves before any office clerical even reports to work. They are on the road, maintaining their trucks, delivering product, and personally interacting with, and serving the Employer's customers, while the office clericals remain in their offices in the warehouse. Although the record demonstrates that Parks and, on occasion, Reyes have direct contact with customers, that contact is over the phone, from the confines of the warehouse, and within a few feet of managers and other resources.

Even Parks' telephonic contact with the sales drivers does not detract from the fundamentally distinct working conditions of employees outside of the warehouse and those at their desks taking phone calls from customers and processing paperwork. Thus, notwithstanding being subject to the same house rules, the office clericals are not required to wear uniforms and are able to take their lunches and breaks in the deli, rather than on the road. Even though Parks has access to hand-held computers, the sales drivers are responsible for other equipment not used by the office clericals such as their trucks and dollies.

Although Parks and, on occasion, Vuong personally interact with the sales drivers at the end of the day to perform the settlement functions, that interaction is of comparatively slight duration, only lasting between 5 and 10 minutes per sales driver and is not sufficient to obviate the differences in day-to-day working conditions between the office clericals and the sales drivers. The Employer also points to the dependence of the sales drivers on Parks to approve customer credit so that they can earn their commissions as an indicia of community of interest between the distinct classifications of employees. However, such functional dependence is not sufficient to destroy the separate interests of the sales drivers or to detract from their status as a homogeneous group.

The Employer further contends that a strong community of interest is demonstrated by the similarity between the wages and benefits of the sales drivers and office clericals. However, the record establishes that while all of the employees have identical health, vacation, and holiday benefits, the wage structure applied to the sales drivers is significantly different. Thus, the sales

drivers are paid hourly with a graduated commission structure, while the clericals are salaried and do not have commissions as part of their pay structure.

The Employer relies on Merry Oldsmobile, 287 NLRB 847 (1987), to support its contention that the office clericals should be included in the unit herein. There, the Board reversed the Regional Director's decision excluding the "after sales" person from a unit of automobile salespersons, finding that the after sales person had a sufficient community of interest with the other salespeople to be included in the unit. The salespeople and the after sales person shared the same supervision, were engaged primarily in selling, had constant contact with each other, and had similar working conditions. In contrast, here, there is no shared supervision, the office clericals are not primarily engaged in sales, do not have constant contact with sales drivers and do not share the same day-to-day working conditions.

Another case relied on by the Employer is also inapposite to the instant case. In Larry Faul Oldsmobile, 262 NLRB 370 (1982), the Board reversed the Regional Director's failure to include the inventory control clerk/office receptionist in a unit of automobile salespeople. The major part of this employee's time was spent performing inventory control duties which maintained her in constant contact with the salespersons. Additionally, the inventory control clerk/office receptionist had the same supervision as the salespersons, enjoyed similar benefits, and had similar working conditions, including the same dress code. In the instant case, again, the office clericals have separate supervision, limited contact with the sales drivers who spend most of their time on the road, dissimilar working conditions, and, unlike the sales drivers are not required to wear any same uniform.

Likewise, Mid-State Distributing Co., 276 NLRB 1511 (1985) also relied on by the Employer can be similarly distinguished from the situation at hand. In that case, the employee at issue was found to be a dual function employee, inventory clerk/receptionist. It was determined that as a result of her inventory clerk duties, she was more of a plant clerical than an office clerical and thus had a substantial community of interest with the unit employees therein, drivers, helpers and warehouse employees, to warrant inclusion in the bargaining unit. It was noted that although her method of pay was different from that of the warehouse employees, so was the pay of the warehouse employees different from that of the drivers and helpers. In the instant matter, Vuong's and Park's work duties are primarily office clerical in nature and, as noted above, they are not primarily engaged in bargaining unit work, driving and sales, and are not in constant contact with the sales drivers.

Based on the foregoing and the record as a whole, and noting particularly the separate immediate supervision received by the sales drivers, their spending most of the work day away from the facility, the separate duties and working conditions experienced by the sales drivers, and their separate method of

compensation, I find that the sales drivers sought by the Petitioner share a distinctive community of interest which warrants their representation in a separate unit. See generally, Overnite Transportation Co., supra; Sears, Roebuck and Co., 235 NLRB 678 (1978).

The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All full-time and regular part-time drivers and sales representatives employed by the Employer at its Salinas, California facility; excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

There are approximately 16 employees in the unit found appropriate.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the Notice of Election to be issued subsequently, subject to the Board's Rules and Regulations.⁵ Eligible to vote are those in the unit who are employed during the payroll period ending immediately preceding the date of the Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States Government may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible to vote shall vote whether or not they desire to be represented by, **LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 270, AFL-CIO**

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties in the election should have access to a list of voters and their addresses which may be used to communicate with them. Excelsior Underwear, Inc., 156 NLRB 1236 (1966); NLRB v. Wyman-Gordon Company, 394 U.S. 759 (1969); North Macon Health Care 359 Facility,

⁵ Please read the attached notice requiring that election notices be posted at least three (3) days prior to the election.

315 NLRB 359, 361 fn. 17 (1994). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, two (2) copies of an election eligibility list containing the full names and addresses of all the eligible voters shall be filed by the Employer with the undersigned, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the NLRB Region 32 Regional Office, Oakland Federal Building, 1301 Clay Street, Suite 300N, Oakland, California 94612-5211, on or before, June 2, 1999. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570. This request must be received by the Board in Washington by June 9, 1999.

Dated at Oakland, California this 26th day of May, 1999.

/s/ James S. Scott

James S. Scott, Regional Director
National Labor Relations Board
Region 32
1301 Clay Street, Suite 300N
Oakland, California 94612-5211

32-1171

440-1760-1900
440-1760-6200